IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No.10026 of 2002
with
SPECIAL CIVIL APPLICATION No.10447 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE JAYANT PATEL

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

DHAVAL RAJDE

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 10026 of 2002
MR DC DAVE for Petitioner No. 1-4
GOVERNMENT PLEADER for Respondent No. 1
NOTICE SERVED BY DS for Respondent No. 2

CORAM : MR.JUSTICE JAYANT PATEL

Date of decision: 24/10/2002

ORAL JUDGEMENT

1. Leave to delete respondent No.2, Dean of B.J. Medical College as party respondent.

2. Rule. Mr.Shelat, learned Counsel waives service of notice of rule on behalf of respondent No.2, Gujarat University in SCA No.10026/2002 (now respondent No.3 in SCA No.10447/2002), Mr.Gori, learned AGP appearing on behalf of respondent No.1 in SCA No.10026/2002 waives service of notice of rule and Mr.Sompura, learned AGP appearing on behalf of respondent No.1 in SCA No.10447/2002 waives service of notice of rule.

3. The question involved in these petitions is whether the merit should be allowed to be sacrificed while giving admission to the Super Speciality course in medical branch? The another question incidentally arises in these petitions is regarding the true and correct interpretation and manner and method of implementing Rules for giving preference for admission framed by the Gujarat University.

4. The relevant Rule framed by the Gujarat University is as under:

> "1. First Preference shall be given to the candidates graduating from this University and passing Post-graduate examination from the same college affiliated to this University. Second preference shall be given to similar candidates from the other college of this University. Third preference will be given to the candidates from other University of Gujarat State. Any vacancy remaining after this shall remain unfilled."

5. The short facts of the case are that the petitioners of SCA No.10026/2002 are the Post Graduate Doctors, who have completed their Post Graduation studies in various branches in the faculty of medicine from the Universities other than Gujarat University, but situated within the Gujarat State. The petitioners of SCA No.10447/2002 are doctors, who have completed Post Graduation studies from the Universities situated outside Gujarat State, except petitioner No.5, who has completed his Post Graduation study from M.S.University, which is situated within the Gujarat State. There is no dispute on the point that for the purpose of giving admission to Super Speciality course, the procedure adopted by the

Gujarat University in accordance with the regulations framed by the Medical Council of India is on the basis of merit in common entrance test only. To say in other words, the performance of the students at the graduation level or at the post graduation level is not to be considered at all while giving marks or while preparing the merit list and the only criteria is the performance of the students concerned at the common entrance test, which is being conducted by the University as per the regulations of Medical Council of India.

6. The contention raised on behalf of the petitioners is that as per the decision of the Apex Court in the case of "Dr.Preeti Srivastava and another v. State of Madhya Pradesh and others", reported in AIR 1999 SC, 2894, the Apex Court has observed that there may not be any reservation for scheduled castes or scheduled tribes while granting admission for Super Speciality course. The petitioners have also contended that in view of the recent judgement of the Apex Court in the case of "AIIMS Students' Union v. AIIMS and Others", reported in 2002(1) SCC, 428, even institutional preference is also not maintained by the Apex Court in the Super Speciality and, therefore, it has been submitted that the preference at the most can be had between the same merits and it cannot be the absolute preference by allotting of seats first to the students of Gujarat University and thereafter only the seats would be made available to the students of the other Universities situated in Gujarat and thereafter to the students of the Universities situated outside Gujarat. It has been submitted by the learned Counsel for the petitioners that if the rules granting preference of giving admission are not read as preference between the equal merits, the rules would be rather arbitrary and not only that, but the preference would be at the cost of the merit which is deprecated by the Supreme Court in the above referred case.

7. On behalf of the respondent University, Mr.Shelat, learned Counsel has submitted that the very rule was subject matter of the challenge in SCA No.4215/1991 before this Court and the Division Bench of this Court had stricken down the rule by holding as ultra vires to the Constitution, against which the Gujarat University had preferred SLP No.1757/1991. Pending the said petition, stay was granted against the operation of the order of the Division Bench. It has been submitted on behalf of the Gujarat University that ultimately as per the decision of the Apex Court in the case of "Gujarat University v. Rajiv Gopinath Bhatt and others" reported in AIR 1996 SC, 2066, the validity of the very

rule is upheld by the Apex Court and, therefore, it has been submitted that when in respect of the very rule the Apex Court has rendered the decision, merely because in the case of "AIIMS"(supra) subsequently the Apex Court has taken a different view, the same would not be applicable here. It has been also submitted that the subject matter of "AIIMS"(supra) was pertaining to the institutional preference at the post graduate level and in any case in the judgement in the case of "Gujarat University v. Rajiv Gopinath Bhatt" (supra) it is not considered. Mr.Shelat has also submitted that in the subject matter of the case before the Apex Court in AIR 1999 SC, 2894 was as to whether the reservation for the scheduled castes and scheduled tribes can be had at the post graduate level or not and, therefore, the said constitution bench judgement of the Apex Court may not be applicable to the present case. Mr.Shelat submitted that the aforesaid judgement of the Apex Court reported in AIR 1999 SC, 2874 is considered by the Division Bench of this Court in its judgement in the case of "Karamsad Medical Association v. State of Gujarat" reported in 2000(2) GLR, 1648 and he submitted that the institutional preference is maintained by the Division Bench and, therefore, it has been submitted that in view of the judgement of the Division Bench of this Court reported in 2000(2) GLR, 1648 and in view of the judgement of the Apex Court in respect of the very rule, the petition deserves to be dismissed and no fault can be found with the University in implementing the rule. Mr.Shelat, however, fairly submitted that so far as the manner and method of implementing the rule is concerned, it is true that common entrance test is duly conducted and the only criteria is the performance at the common entrance test. However, he submitted that three merit lists are being prepared by the University; (1) of the students from the Gujarat University, (2) of the students of the other Universities in the Gujarat State, and (3) of the students of the Universities outside the Gujarat State. He submitted that while giving admission in Super Speciality course, the first list of the Gujarat University is considered first and thereafter, if the seats are available, the students are accommodated from the second list namely, students of the Universities situated in Gujarat State, but other than Gujarat University and thereafter, if the seats are available, admissions are being given to the students of the Universities outside Gujarat. He also submitted that since all these students are being considered for the purpose of giving admission in Super Speciality and merely because three separate merit lists are being prepared, it cannot be said that the method and manner of

implementing the rule is incorrect. Mr.Shelat fairly submitted that the common merit list of all the students of their performance at the common entrance test is not being prepared. However, he submitted that such practice of preparing three separate lists is in operation since many years and he submitted that such practice was also there at the time when the Division Bench of this Court struck down the rule and at the time when the Apex Court decided the matter in the case of "Gujarat University v. Rajiv Gopinath Bhatt and others' reported in AIR 1996 SC, 2066 and, therefore, he submitted that it cannot be said that the University has committed any wrong in the manner and method of implementing the rule.

8. The above referred rule for the purpose of selection to the Super Speciality course, if read as it is, shows that the first preference shall be given to the candidates graduating from the Gujarat University and the second preference shall be given to the similar candidates from other Universities of the Gujarat State. In other words, the rule speaks for giving preference for admission only. It does not speak for any other reservations made for the students of Gujarat University or for the students of the other Universities situated in Gujarat or for the students of Universities situated outside Gujarat. On true and correct interpretation of the aforesaid rule, it appears that between the same merit, preference can be given to the students of Gujarat University first and then to the students of the Universities other than Gujarat University but situated in the Gujarat State and thereafter preference can be given to the students of the Universities situated outside Gujarat. Since there is no separate reservation for any other category the rule deserves to be interpreted accordingly. It is well settled that when the language of the statute or any rule is clear, nothing can be added therein. The preference means the preference between the same merits and it cannot be read as preference by sacrificing the merit or preference to the students having lesser merits. In my view, the word preference cannot be read to mean reservation. The manner and method as indicated earlier of applying the rule by the University, in my view, creates not only the preference, but makes special reservation for the students of Gujarat University and thereafter for the students of the other Universities situated in Gujarat. Such method and manner of implementing the rule can be permitted only if there is a special reservation for the purpose of distribution of seats. If the seats are reserved, may be of a particular percentage for the students of a particular category, then a separate merit

list may be required to be prepared and on the basis of inter se merit, the admission may be allowed. Since there is no reservation for the students of any University, as it appears from the rule, it is to be interpreted that between the same merits the preference shall be given and the preference cannot be given or would not be given to students having less merits.

9. The Apex Court in the case of "Gujarat University" (Supra), has observed at para 5 as under:

"5. Without examining that question in detail it may be pointed out that the aforesaid judgements were not in connection with the admission in super speciality course. At the same time, we reiterate that object of any institution while selecting applicants for admission is to select the best amongst the applicants, regional and other considerations which do not satisfy the test of Article 14 of the Constitution should not affect the merit criteria. But from time to time , this Court taking into consideration the local and regional compulsions have been making efforts to strike a balance so that the students who have pursued the studies in a particular State and have been admitted in the medical colleges of that State are not suddenly thrown on the street when question of their admission in super speciality courses arises, in which the seats are limited in number. In the case of Pradeep Jain v. Union of India (AIR 1984 SC 1420 at p. 1439) (supra) this Court has observed:

"We are, therefore, of the view that a certain percentage of reservation on the basis of residence requirement may legitimately be made in order to equalise opportunities for medical admission on a broader basis and to bring about real and not formal, actual and not merely legal, equality. The percentage of reservation made on this count may also include institutional reservation for students passing the PUC or premedical examination of the same university or clearing the qualifying examination from the school system of the educational hinterland of the medical colleges in the State.."

The same question was again examined in the case of Dinesh Kumar v. Motilal Nehru Medical

College, (1986) 3 SCC 727: (AIR 1986 SC 1877). Recently, in the case of Anant Madaan v. State of Haryana, (1995) 2 SCC 135: (1995 AIR SCW 914, Para 13) it was said:

"The eligibility condition, therefore, which requires that the candidate should have studied 10th, 10+1 and 10+2 classes from a recognised institution in the State of Haryana is neither arbitrary nor unreasonable and the Punjab and Haryana High Court has rightly upheld the same"

Therefore, if a rule has been framed out of the merit list prepared, preference is to be given for admission to the Super Speciality courses to the students of the University in question, per se, it cannot be held to be arbitrary, unreasonable or violative of Article 14 of the Constitution."

10. Therefore, the basis of giving admission is the merit and the merit alone with the scope of preference. In my view the Apex Court, while discussing the matter, at para 5, has already expressed that without examining the question in detail, the observations are made, but even if such observations are taken into consideration on the face of it, then also in my view, the Apex Court wanted to convey that in a merit list a preference can be given to a student of a particular University. The Apex Court nowhere in the said judgement has ruled that the merit is to be given a go-by or a student having less merit is to be given preference vis-a-vis the student having higher merit.

11. In the case of "Dr.Preeti Srivastava and anr. Vs. State of Madhya Pradesh and ors" reported in AIR 1999 SC, 2894, it is true that the facts of the case were pertaining to the reservations for scheduled castes and scheduled tribes at the Post Graduation level. However, at para 62 Sub-para 4, the Apex Court, while concluding, has observed as under:

"4. At the level of admission to the super speciality courses, no special provisions are permissible, they being contrary to the national interest. Merit alone can be the basis of selection."

12. Mr.Shelat wanted to distinguish the judgement on the ground that it could apply to the case of reservation

for scheduled castes and scheduled tribes or a special category as per Article 15 of the Constitution and he submitted that such is not the present situation. As a matter of fact, the vigor of constitutional mandate that of the reservation of scheduled castes and scheduled tribes would be more in comparison to the preference or any reservation for a particular institution. If the constitution Bench of the Apex Court, while testing the said constitutional mandate, has observed that there may not be any reservation for scheduled caste and scheduled tribe person for admission to super speciality course since it is contrary to the national interest, in my view the said observation made by the Apex Court are required to be kept in mind while interpreting and giving effect to the rule in question. It is pertinent to note that while considering the scope and ambit of making reservation at para 67, the Apex Court has observed as under:

> "While the object of Article 15(4) is to advance the equality principle by providing for protective discrimination in favour of the weaker sections so that they may become stronger and be able to complete equally with others more fortunate, one cannot also ignore the wider interests of society while devising such special provisions. Undoubtedly, protective discrimination in favour of the backward, including Scheduled Castes and Scheduled Tribes is as much in the interest of society as the protected groups. At the same time, there may be other national interests, such as promoting excellence at the highest level and providing the best talent in the country with the maximum available facilities to excel and contribute to society, which have also to be borne in mind. Special provisions must strike a reasonable balance between these diverse national interests."

13. The case of "Karamsad Medical Association"(supra) before the Division Bench of this Court was a case of giving institutional preference at the post graduate level and not at the level of Super Speciality and, therefore, the Division Bench of this Court, after considering the above referred judgement of the Supreme Court in the case of "Dr.Preeti Srivastava" (supra) observed that preference given by the University to its own students cannot be said to be bad in law. However, the case before the Division Bench was not as to whether the preference can be given between the student having

less merit as against the student having more merit while giving admission in Super Specialities. Such question is not examined by the Division Bench and, therefore, in my view, the said judgement is of not help to Mr.Shelat. Further, in any case, in the recent decision of the Apex Court, in the case of "AIIMS Students'(supra), reported in 2002(1) SCC, 428 at the concluding para of 59, the Apex Court has observed as under:

"59. The upshot of the above discussion is that institutional reservation is not supported by the Constitution or constitutional principles. A certain degree of preference for students of the same institution intending to prosecute further studies therein is permissible on grounds of convenience, suitability and familiarity with an educational environment. Such preference has to be reasonable and not excessive. The preference has to be prescribed without making an excessive or substantial departure from the rule of merit and equality. It has to be kept within limits. Minimum standards cannot be so diluted as to become practically non-existent. Such marginal institutional preference is tolerable at postgraduation level but is rendered intolerable at still higher levels such as that of superspeciality. In the case of institutions of national significance such as AIIMS, additional considerations against promoting reservation or preference or any kind destructive of merit become relevant. One can understand a reasonable reservation or preference being provided for at the initial stage of medical education i.e. undergraduate level while seeking entry into the institute. It cannot be forgotten that the medical graduates of AIIMS are not "sons of the soil". They are drawn from all over the country. They have no moorings in Delhi. They are neither backward nor weaker sections of the society by any standards - social, economic, regional or physical. They were chosen for entry into the Institute because of their having displayed and demonstrated excellence at all-India level competition where thousands participate but only a mere 40 or so are chosen. Their achieving an all-India merit and entry in the premier institution of national importance should not bring in a brooding sense of complacence in them. They have to continue to strive for achieving still higher scales of excellence. Else there would be no justification for their continuance

> in a premier institution like AIIMS. In AIIMS where the best of facilities are available for learning with the best of teachers, the best of medical services, sophistication, research facilities and infrastructure, the best entrants selected from the length and breadth of the country must come out as the best of all- India graduates. We fail to understand why those who were assessed to be the best in the country before entering the portals of the Institute fall down to such low levels as having perceptibly ceased to be best, not remaining even better, within a period of a few years spent in the Institute."

14. In view of the above discussion, it is got to be concluded that at the super speciality level, if the merit is to be given go-by, then it would be intolerable and would be rather against national interests. It cannot be forgotten that the education at the super speciality level would contribute to a great extent to the society and at that level, the best talent and merit only should be the criteria. It may be that between the same merits, the students of a particular University or of the same University may be given preference, but such preference in view of the above referred two judgements of the Apex Court in the case of Dr.Preeti Srivastava"(supra) and "AIIM Students' Association"(supra) cannot be given at the cost of the merits. If the rule is applied for giving preference to the students of the same University between the same merits, then it may be permissible. The reason being that the particular State contributes for the expenses for running colleges and imparting education. In the present case, B.J.Medical College is fully owned by the State Government, but it is only affiliated to Gujarat University. There cannot be any special distinction amongst the students even on the basis of region, if they have completed their post graduation study from the Universities other than Gujarat University, but situated in Gujarat. In any case, such distinction can be maintained in admission to Super Specialities only if preference is given between the same or equal merit.

15. Mr.Dave, learned Counsel appearing for the petitioner is right in his submission that there cannot be any such distinguishing class for the students by compromising the merits. At the most, between the same merits preference may be there. In the Gujarat State admissions are being granted, even in medical branches, on the basis of the performance at 12th Standard through

the centralised admission system. Therefore, even a student may be staying within the area of Gujarat University or in a particular locality in Gujarat may get admission in a University situated in Gujarat and the college may not be affiliated to Gujarat University. Further, after completion of the study at M.B.B.S. and Post Graduation, there is no such distinctive features for testing the merit because the only test of merit is the performance at the common entrance test. In my view, in any case, the preference cannot be maintained for the students of Gujarat University unless such preference is read between the same merits. I am inclined to take such view because, as observed by the Apex Court for admission to super speciality level, merit and only merit should be the criteria and the best talent must get an opportunity because after completion of the study they are to contribute to the nation at large.

16. Keeping in view the aforesaid, rule is required to be interpreted. As observed earlier, rule does not provide for making any such reservation or allotment of seats at admission, nor does it provide for giving go-by to the merit. Rule also does not provide for giving preference to a student having less merit in comparison to the student having more merit. In my view, even such was not intended or the Apex Court in the judgement in the case of (Gujarat University v. Rajiv Gopinath" reported in 1996 SC, 2066(supra) and the Apex Court has never interpreted that the preference can be maintained by giving admission to the students having less merits. Such construction of the rule in the matter of admission in Super Specialities, in my view, would not be in the larger interests of the nation, as per the observations made by the Apex Court in the case of "Preeti Srivastava" (supra) and "AIIMS Students' Union" (supra). In my view to see that the national interests are sufficiently taken care of and the balance of preference is maintained, the only construction of rule would be that the preference can be given as contemplated under the rule, between the students having same merits so far giving admissions in Super Specialities. Since the University is not implementing the rule, as interpreted by this Court earlier, appropriate directions would be required to be given.

17. In view of the above discussion, the petition is allowed to the extent that the Gujarat University is directed to give admission to the students in Super Specialities by giving preference as indicated under Rule 1, between the same merits and if the student is having less merit in comparison to the student of other

University, such preference will not be given. It is, therefore, directed that the respondent University shall prepare a common merit list comprising of all students and between the same merits preference may first be given to students of Gujarat University and thereafter to the students of the Universities other than Gujarat University, which are situated in Gujarat State and thereafter the students of the Universities situated outside Gujarat State.

18. The respondent University is also directed to undertake the said exercise afresh for preparing the common merit list and to grant the admission to the eligible candidates accordingly.

19. The petition is allowed to the aforesaid extent. Rule is made absolute accordingly. No costs.

20. Mr.Shelat, learned Counsel for the respondent University, states that the operation of this order may be suspended for some time so as to enable the respondent University to approach before the higher forum. Considering the facts and circumstances of the case, since the merit is the only basis for the purpose of giving admission, I am of the view that the suspension of operation of the order would, on the contrary, adversely affect the national interests and, therefore, the request is rejected.

24-10-2002 (Jayant Patel, J.)

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